

In the Matter of  
Shentel Telecommunications Company  
Emergency Petition for Finding of Bad Faith  
Retransmission Consent Negotiations and  
Enforcement of Customer Notice Rules  
ACC Licensee, Inc.  
WJLA-TV, Washington, D.C.

MB Docket No. 12-1

To: The Secretary's Office  
Attn: The Media Bureau

## REPLY TO OPPOSITION

**ACC LICENSEE, INC.**

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January 17, 2012

Its Attorneys.

## SUMMARY

As of this submission, Shentel subscribers have been without WJLA programming for 17 days ...and counting. Shenandoah Cable Company's ("Shentel's") petulant Opposition is nothing more than an odd mixture of novel, and ill-formed legal theory, and alleged "facts" that literally cannot all be true. The record amply demonstrates that this is a simple case of *bad faith* -- Shentel pretended to negotiate with WJLA until WJLA accepted its terms, then it withdrew the deal and refused to propose any other terms. Shentel either intentionally violated the Communications Act (the "Act") and the Commission's rules, or it so thoroughly misunderstands its obligations that it is incapable of compliance. Whichever is the case, Shentel's manifest and admitted bad faith conduct must be remedied immediately to protect Shentel's subscribers and WJLA's viewers. Shentel's lament that it is only protecting its subscribers from increased rates is specious since *WJLA has agreed to Shentel's own proposal!*

This is a time when expeditious action by the Commission is uniquely required. Every day the Commission does not act is an additional day Shentel subscribers are denied access to long relied-upon WJLA programming. For the reasons described herein and in the Petition, Allbritton requests that the Commission find Shentel guilty of bad faith and grant the relief described in the Petition.

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<sup>1</sup> See Shenandoah Cable Company, Opposition to Emergency Petition, filed January 9, 2012 (the “Opposition”).

case, Shentel's manifest and admitted bad faith conduct must be remedied immediately to protect Shentel's subscribers and WJLA's viewers. The Commission should expeditiously grant the Petition and commence enforcement proceedings against Shentel.

**I. THE COMMUNICATIONS ACT, NOT THE COMMON LAW OF CONTRACTS, PROVIDES THE BASIS FOR SHENTEL'S BAD FAITH CONDUCT**

Shentel's main argument is that the common law of contracts somehow shields it from liability under the Communications Act and the Commission's rules. Shentel claims that it did not bargain in bad faith because its offer transmitted to Allbritton on November 10, 2011 and reiterated on December 6, 2011 (the "November 10 Offer")<sup>2</sup> did not become an enforceable contract under the Restatement (Second) of Contracts and Virginia common law when Allbritton accepted it on December 22, 2011.<sup>3</sup> This argument is a classic *non-sequitur* – it completely misunderstands both the Petition and Shentel's retransmission consent negotiation responsibilities. It is a legal slight-of-hand misdirection that the Commission should summarily discard. Allbritton never argued that the parties had an enforceable contract.<sup>4</sup> Rather, Allbritton contends – and the record demonstrates – that Shentel's failure to conclude a contract on the terms of Shentel's own November 10 Offer constitutes bad faith under the Act and the Commission's rules.

Shentel further contends that it should be free from any obligation to honor its November 10 Offer because Commission intervention would disturb the common law.<sup>5</sup> This is precisely backwards. The common law of contracts in the United States never has imposed a good faith

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<sup>2</sup> See *id.*, Exhibit A at 9-10.

<sup>3</sup> See Opposition at 2-4, 7-10.

<sup>4</sup> The question of whether the parties formed an enforceable contract is neither before the Commission nor an appropriate matter for the Commission's consideration. Allbritton, however, does not concede that no enforceable contract was formed. By soliciting a counteroffer to the November 10 Offer, Shentel employee David Ferguson appears to have revived that offer.

<sup>5</sup> See Opposition at 8-9.

bargaining requirement on negotiators prior to conclusion of a contract.<sup>6</sup> The Act, however, represents Congress's decision to abrogate that common law rule by specifically imposing good faith duties on both broadcasters and cable operators negotiating retransmission consent.<sup>7</sup> The Commission's implementing rules, moreover, impose particular objective requirements on retransmission consent negotiations, including, among other duties, to bargain with "a sincere desire to reach an agreement,"<sup>8</sup> and to respond to efforts of negotiating partners with clear and honest explanations of each party's position and the reasons for rejection of good faith offers.<sup>9</sup> Shentel failed to fulfill these duties, and abrogated common law principles cannot save Shentel from its consequent liability.

This case shows why accepting Shentel's invitation to elevate the common law of contract over the Act would lead to absurd results. Shentel argues that requiring parties to honor their most recent good-faith offers would remove any incentive for a party to accept an offer before the last minute.<sup>10</sup> By way of example, Shentel claims that it became concerned "as the weeks went by" that its offer to Allbritton had been too "generous" and that a Commission finding of bad faith would eliminate its flexibility to reconsider offers it no longer believed were appropriate.<sup>11</sup> As the Opposition makes clear, however, Shentel was in constant communication with Allbritton during the two weeks following Shentel's December 6 reiteration of the November 10 Offer, and it could have withdrawn the November 10 Offer at any time and

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<sup>6</sup> See Restatement (Second) of Contracts, § 205 cmt. c (1981) (noting that while every contract imposes a covenant of good faith and fair dealing in its performance, there is no such obligation during the formation of the contract).

<sup>7</sup> 47 U.S.C. § 325(b)(3)(C).

<sup>8</sup> Implementation of the Satellite Home Viewer improvement Act of 1999, *First Report and Order*, 15 FCC Rcd 5445, 5458 (2000) ("*SHVIA Order*").

<sup>9</sup> See 47 C.F.R. §§ 76.65(b).

<sup>10</sup> See Opposition at 8-10.

<sup>11</sup> See *id.* at 9.

substituted another offer it thought was appropriate.<sup>12</sup> It chose not to give any indication that the November 10 Offer was not acceptable to Shentel until six days after Allbritton accepted the offer on December 22, 2011. A party bargaining in good faith would have informed Allbritton immediately that negotiations were terminated and that the November 10 Offer was no longer available, proposed new terms, or explained why no terms would be acceptable. Shentel did none of these things. To this day it has not given any further clue as to what an appropriate offer would be. Common law contract *might* allow such conduct, but the Commission should recognize and punish it as bad faith under the Act.<sup>13</sup>

In any case, Allbritton seeks relief under the Act and the FCC's rules, not under common law contract. As described in Sections II and III below, Shentel violated the Act and Section 76.65 of the Commission's rules in myriad ways, but its most egregious violation was refusing to accept its own proposed terms – while piously, gallingly, and disingenuously claiming it did so to protect its subscribers from “egregious rates” that it, in fact, proposed. For Shentel to claim that it is protecting its subscribers is as nonsensical as it is offensive. The November 10 Offer was Shentel's last presumably good faith offer of retransmission consent terms and Allbritton accepted that offer *before* Shentel withdrew it, *before* Shentel explained why the offer was no longer suitable, and *before* Shentel replaced it with a promised (though never delivered) subsequent good faith offer. If the Commission cannot even find it to be bad faith for a party to make an offer and then refuse to accept it, then what could possibly exhibit bad faith? The

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<sup>12</sup> See *id.* at Exhibit A.

<sup>13</sup> The Commission also should decline Shentel's invitation to subject all retransmission consent negotiations to the contract law of multiple states. The logic of Shentel's argument is that the FCC impractically should administer its analysis of bad faith under 51 different standards. That, of course, begs the potential questions of what to do with contracts covering broadcasters and MVPDs with stations and systems spanning multiple states. Which common law would control? Shentel's theory collapses under its own weight.

simplest and best way to resolve this case would be to (1) confirm expeditiously that it was bad faith for Shentel to reject its own deal; and (2) require Shentel to conclude a retransmission consent agreement incorporating the terms of the November 10 Offer.

## **II. SHENTEL'S ADMISSIONS DEMONSTRATE PER SE BAD FAITH NEGOTIATIONS AS A MATTER OF LAW.**

Shentel confusingly takes great umbrage at the allegations in the Petition, but the undisputed facts establish Shentel's bad faith as a matter of law. Shentel admits that (1) on December 22, 2011, Allbritton sought to accept retransmission consent terms that had been proposed by Shentel on November 20, 2011 and reiterated on December 6, 2011;<sup>14</sup> (2) On December 28, 2011, Shentel refused to enter into an agreement on its own previously-proposed terms;<sup>15</sup> (3) also on December 28, 2011, Allbritton requested that Shentel offer acceptable terms;<sup>16</sup> and (4) since that date, Shentel has refused to conclude a deal based on its own last proposed terms or propose other terms that would be acceptable.<sup>17</sup> These facts alone are more than sufficient to establish a violation of the requirements that parties negotiate and articulate their reasons for refusing to accept a negotiating partner's offer.<sup>18</sup>

Shentel's defense is that it satisfied its negotiating obligations by first, making an offer that Allbritton did not immediately accept; and second, notifying Allbritton on December 20, 2011 of its intent to drop WJLA from its Shenandoah County cable system.<sup>19</sup> Shentel admits,

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<sup>14</sup> See *id.* at 6 & Exhibit A at 5; Petition at 4 & Exhibit 1 at ¶ 7.

<sup>15</sup> See Petition at 4-5 & Exhibit 1 at ¶ 8. Shentel describes these facts as "alleged," but in fact it acknowledges that this conversation took place (See Opposition, Ferguson Decl. at ¶¶ 6-7) and does not deny its contents as "alleged" in the Petition. Facts in a petition under Section 76.7 that are not denied are deemed admitted. 47 C.F.R. § 76.7(a)(2)(v).

<sup>16</sup> See *id.*

<sup>17</sup> See Petition at 4-6 & Exhibit 1 at ¶¶ 8-10. Shentel neither denies these facts nor claims to have made any offer of terms since December 20, 2011.

<sup>18</sup> 47 C.F.R. § 76.65(b)(i), (v).

<sup>19</sup> See Opposition at 5.



however, that it continued negotiating after December 20,<sup>20</sup> asserting that “Shentel would still consider carriage of WJLA under favorable terms.”<sup>21</sup> Yet Shentel cannot assert that it complied with the requirements of Section 76.65 during the post-December 20 period because it never made an offer of terms and it never explained why it would not accept the terms it previously had proposed.

In an effort to repair this gaping hole in its argument, Shentel raises the novel and unfounded claim that negotiations after December 20 were immune to the requirements of the Act and the rules because “Shentel had already conducted good faith negotiations.”<sup>22</sup> In other words, Shentel asserts that the rules ceased to apply when it notified Allbritton that it was dropping WJLA’s signal, and Shentel then was permitted to conduct negotiations however it pleased, *i.e.*, in bad faith.<sup>23</sup>

Shentel’s novel construction of the good faith requirement is thoroughly meritless and affirmatively dangerous. The Commission’s rules do not provide Shentel with a faucet to turn good faith obligations on and off at will. In the hundreds of pages of congressional and administrative history accompanying enactment of the bargaining requirements by Congress in

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<sup>20</sup> See *id.*, Ferguson Decl. at ¶¶ 6-7.

<sup>21</sup> Opposition at 10 (citing Ferguson Decl.).

<sup>22</sup> Opposition at 5 & n.9.

<sup>23</sup> See *id.*; see also Ferguson Decl. ¶ 6.

1999 and 2005,<sup>24</sup> implementation by the Commission in 2000 and 2006,<sup>25</sup> and subsequent enforcement by the Commission,<sup>26</sup> not a single word supports Shentel's position that the good faith obligations can be unilaterally terminated and that no rules apply to subsequent negotiations. The pernicious results that would flow from such an interpretation are too numerous and obvious to bother cataloguing.<sup>27</sup> The only sensible reading of the Act – and the reading consistent with every stitch of the history of this law – is that so long as the parties are negotiating they are prohibited from negotiating in bad faith.

Shentel disagrees, claiming its construction is necessary because otherwise the rules “would effectively preclude a party from ever safely terminating a retransmission consent negotiation.” That is silly; Shentel could have terminated its negotiations with Allbritton at any time after the parties reached a *bona fide* impasse. In this case, however, no such impasse was ever reached because it is undisputed that after December 22, 2011, the parties continued to negotiate and Allbritton continued trying to meet Shentel's demands, including asking Shentel to tell it what Shentel would be willing to pay for carriage (*after Shentel had rejected its own*

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<sup>24</sup> The original good faith bargaining requirement was enacted as part of the Satellite Home Viewer Improvement Act of 1999, which was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, PL 106-113, 113 Stat. 1501, Appendix I (1999). The good faith provision was codified at 47 U.S.C. § 325(b)(3)(C). The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, §207, 118 Stat 2809, 3393 (2004), amended 47 U.S.C. § 325(b)(3)(C) to make the bargaining requirement applicable to both broadcasters and MVPDs.

<sup>25</sup> *SHVIA Order*, 15 FCC Rcd 5445 (2000), *on recon.*, *Order on Reconsideration*, 16 FCC Rcd 15599 (2001); Satellite Home Viewer Extension and Reauthorization Act of 2004 (Reciprocal Bargaining Obligation), *Report and Order*, 20 FCC Rcd 10339 (2005).

<sup>26</sup> See, e.g., *ATC Broadband v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (2009); *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd 284 (2007).

<sup>27</sup> One example of the absurd results that would flow from Shentel's proposed interpretation of Section 76.7 would be the applicability of the rules in situations where one side threatens to drop a signal or withhold carriage. If Section 76.65 ceased to apply each time a party issued a threat like Shentel's December 20, 2011 email, good faith obligations would end up applying to few, if any, negotiations.

*offer*).<sup>28</sup> Indeed, Shentel does not deny that it agreed to provide a counter-offer to Allbritton on December 28 or 29, 2011, but failed to do so.<sup>29</sup> Shentel thus admits that it chose to continue negotiating with Allbritton in the hopes of reaching a mutually beneficial result, but it failed to either propose terms or explain why its previous offer was no longer acceptable.<sup>30</sup> These failings constitute bad faith *per se* under the Commission's rules.

### **III. THE TOTALITY OF THE CIRCUMSTANCES DEMONSTRATES A LONG PATTERN OF BAD FAITH NEGOTIATIONS.**

The undisputed facts also show that both Shentel's pre-December 20, 2011 actions and its conduct since constitutes bad faith under the "totality of the circumstances."<sup>31</sup> The rules require Shentel to bargain with "a sincere desire to reach an agreement,"<sup>32</sup> but Shentel did the opposite. In particular, the evidence demonstrates that Shentel misrepresented its intention to carry both WJLA and out-of-market ABC affiliate WHSV-TV, Harrisonburg, Virginia ("WHSV") and affirmatively misled WJLA about its intention not to pay for carriage of WHSV. As it turns out, Shentel apparently was holding a silent auction between WJLA and WHSV, but it never let WJLA in on that fact.

In its Opposition Shentel pretends that it always made clear "that difficult rate negotiations might lead Shentel to carry a single ABC affiliate, and that affiliate might *not* be WJLA,"<sup>33</sup> and that Allbritton simply misjudged the risk that Shentel would choose to carry

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<sup>28</sup> Petition at 4-5 & Exhibit 1 at ¶ 8. Again, Shentel does not deny, and thus admits this allegation.

<sup>29</sup> *See id.*

<sup>30</sup> Opposition at 5, 10 & Exhibit 1 at ¶ 6.

<sup>31</sup> 47 C.F.R. § 76.65(b)(2).

<sup>32</sup> *SHVIA Order*, 15 FCC Rcd at 5458.

<sup>33</sup> Opposition at 8 (citing Opposition Exhibit A at 12).

WHSV over WJLA.<sup>34</sup> This is revisionist history, as the correspondence Shentel included demonstrates. On both October 5, 2011, and November 9, 2011, Mr. Ferguson, Shentel's negotiator, stated that he hoped to carry both WJLA and WHSV if the rates were right.<sup>35</sup> Mr. Ferguson never said he was planning to pay for WHSV's signal, only that his overall costs would be unacceptable if he had to. After November 9, 2011 he never even mentioned WHSV by name and he did not suggest rate negotiations with WHSV might preclude an agreement with WJLA at the rate level that Shentel itself proposed in the November 10 Offer until December 28, 2011, when he told Allbritton that the price he paid for WHSV was too high to permit a deal for WJLA.

**More importantly, Shentel knew that Allbritton would not consider rate competition from WHSV as part of the negotiations because Shentel explicitly notified Allbritton that it would not be paying for out-of market signals.**<sup>36</sup> In its sly effort to play WJLA off against WHSV to maximize its negotiating advantage, Shentel is exposed and cornered by its own words. Shentel chose to include some emails between Allbritton and

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<sup>34</sup> See Opposition at 4, 8, 9-10.

<sup>35</sup> Opposition at Exhibit A at 10, 12.

<sup>36</sup> Allbritton refrained from including with the Petition the email traffic between Allbritton and Shentel negotiators out of respect for the fact that those were private communications that, in any case, contain only some of the negotiations. Now that Shentel has introduced private communications into the record, Allbritton includes the emails described below in the interests of a completeness and has redacted all confidential information. Allbritton also notes with extreme disappointment that Shentel inappropriately disclosed confidential information in Exhibit A of the Opposition by not reacting all confidential terms.

Shentel in its Opposition, but conspicuously omitted the following from Shentel negotiator Chris Kyle to Allbritton negotiator Randy Smith (highlighting added):

**From:** Chris Kyle [<mailto:Chris.Kyle@emp.shentel.com>]  
**Sent:** Tuesday, December 13, 2011 4:44 PM  
**To:** Randy Smith  
**Subject:** RE: Shentel Viewing

Thanks Randy. We have negotiated 3 ABC deals since you and I last spoke. They are well below your first offer of [REDACTED]. And also below your second offer of [REDACTED]. I appreciate your work on this and I understand your limitations from corporate.

We feel a fair value for your station is [REDACTED]. We will not pay for any out of market DMA subs. Please relay to your corporate team that we are not paying for out of market DMA subs in our other agreements. Based on what we know now, I cannot justify anything close to your first two proposals.

How do you want to proceed?

Thanks,  
Chris

Shentel claims that this email “did *not* refer to the WJLA negotiations.”<sup>37</sup> That is nonsense.

Unsurprisingly, Shentel offered no declarant for this assertion because it is almost certainly a false statement. Only six days before Mr. Smith received the email above from Mr. Kyle, he had an email exchange with Mr. Kyle in which Mr. Kyle admonished Mr. Smith for sharing information about negotiations between Shentel and WSET with another station, presumably WJLA.<sup>38</sup> Mr. Smith responded the same day, reminding Shentel that WJLA and WSET were co-owned and that Shentel’s communications to WSET would be shared with Allbritton. Moreover,

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<sup>37</sup> Opposition at n.15. The full email exchange between Messers Kyle and Smith between December 13 and 14, 2011 regarding this matter are included as Exhibit 1 hereto.

<sup>38</sup> The full email exchange between Messers Kyle and Smith regarding this matter between December 6 and 7, 2011, are included as Exhibit 2 hereto. On December 7, 2011, Randy Smith was chastised by Mr. Kyle, who stated: “Today, we were notified in an email that your company shared the rates we are negotiating with WSET with a non-affiliated ABC station that we are also negotiating with. We are extremely upset by this and believe this action does not represent “good faith” or fair negotiations.” This of course, is an ironically hypocritical instance of the pot calling the kettle black, and anger that their clandestine scheme of proposing inconsistent positions relating to payment for out-of-DMA carriage had been exposed.

Mr. Kyle's email by its terms was not restricted to commenting on the WSET negotiation; Mr. Kyle's reference to "3 ABC deals since you and I last spoke" and his instructions to tell Allbritton's "corporate team" that Shentel is not paying for out-of-market subscribers in its "other agreements" eliminate any doubt that Shentel sought to convey to Allbritton that Shentel would not be paying for out-of-market subscribers in any of its agreements. Thus, Mr. Kyle knew exactly what the statements of his email would convey and to whom it would convey them.

Under these circumstances, Allbritton was more than justified in concluding that Mr. Ferguson's early references to potential payment for WHSV were merely posturing and that Shentel's actual position was the one affirmatively represented by both Mr. Ferguson and Mr. Kyle. Shentel's claim that this was an "unwarranted leap"<sup>39</sup> is akin to saying "Allbritton should have known Shentel's negotiators were lying."<sup>40</sup> Of course, Mr. Kyle's misrepresentation occurred at a time when even Shentel acknowledges that the good faith bargaining rules applied, and it demonstrates Shentel's bad faith. In the end, this duplicitous argument has all the sophistication of the playground promise ruse, "Na, Na, I had my fingers crossed!"

Allbritton did not learn that Shentel was dealing dishonestly until Mr. Ferguson told Allbritton on December 28, 2011 that the rates it ended up paying for WHSV limited its ability to pay for WJLA.<sup>41</sup> That Mr. Ferguson provided this information to WJLA is undisputed, yet Shentel now coyly contradicts Mr. Ferguson by suggesting that it may or may not have paid for carriage of WHSV and that in any case its decision whether or not to pay for WHSV had no

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<sup>39</sup> *See id.*

<sup>40</sup> Shentel is grasping at straws when it claims that Allbritton had some duty to confirm with Mr. Ferguson the accuracy of Mr. Kyle's email. Opposition at n.15. If Shentel had been negotiating in good faith as required by the Act and the FCC's rules, Shentel would have made clear its position regarding carriage WJLA and WHSV and Allbritton would not have been misled by Mr. Kyle's guarantees.

<sup>41</sup> Petition at 4 & Exhibit 1 at ¶ 8.

bearing on its decision not to conclude a deal with Allbritton.<sup>42</sup> This means that Shentel is either lying now or its only declarant, Mr. Ferguson, was lying on December 28, 2011 when he told Allbritton the opposite. Either of these possibilities destroys the credibility of Shentel, Mr. Ferguson, and the entire Opposition. Moreover, if Mr. Ferguson was lying on December 28, 2011, it is yet another example of Shentel's bad faith.

#### **IV. SHENTEL'S ADMITTED VIOLATIONS OF THE GOOD FAITH AND SERVICE CHANGE NOTICE REQUIREMENTS DEMAND FURTHER INVESTIGATION.**

Shentel concedes that it violated the service change notice provisions of the Act and the Commission's rules,<sup>43</sup> but objects to Allbritton's supposed efforts to "bully Shentel into submission."<sup>44</sup> Shentel fails to recognize that the requirement of notice to broadcasters, customers, and local franchising authorities is an important part of cable operators' responsibility to deal with all interested stakeholders in good faith. Far from a "regulatory 'gotcha,'" Allbritton is merely asserting rights the Commission created to ensure that operators like Shentel behave responsibly. Pointing out Shentel's failure to do so does not make Allbritton a bully – after all, WJLA is the one that has been dropped from Shentel's system and lost access to thousands of its long-time viewers. Shentel seeks to destroy Allbritton's relationship with its Shenandoah County viewers; the least it can do is provide proper notice.<sup>45</sup>

Even Shentel doesn't believe its own claim that local press accounts of its dispute with Allbritton provided the required notice to customers.<sup>46</sup> To forestall a Commission investigation,

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<sup>42</sup> Opposition at n.15.

<sup>43</sup> *Id.* at 11-13.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> Shentel's gratuitous and self-serving claim that its subscribers don't care that Shentel has dropped WJLA is irrelevant to whether Shentel provided appropriate notice to customers. *Id.* at 13. The Commission's rules protect Shentel's customers from surprise service changes whether Shentel thinks they want that notice or not.

<sup>46</sup> *Id.* at 12-13.

it makes an offer of refund to affected customers.<sup>47</sup> This proceeding, however, is not the appropriate place for Shentel to negotiate its consent decree with the FCC over its admitted notice violations. As noted in the Petition, determining the full extent of Shentel's violation of the rules requires an investigation and enforcement proceeding, which the Commission should initiate at its earliest opportunity.<sup>48</sup> Such enforcement proceeding also should consider what fines to levy against Shentel for its on-going bad-faith negotiations described in Sections I-III above and its apparent false statements to the Commission.

## V. CONCLUSION

For the reasons described herein and in the Petition, Allbritton respectfully requests that the Commission find Shentel guilty of bad faith and grant the relief requested in the Petition. This is a time when expeditious action by the Commission is uniquely required. As of this submission, Shentel subscribers have been without WJLA programming for 17 days ...and counting.

Respectfully submitted,

**ACC LICENSEE, INC.**



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January 17, 2012

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<sup>47</sup> *Id.* at 13.

<sup>48</sup> The concept of providing adequate notice, of course, lies at the very heart of the Commission's ongoing rulemaking proceeding potentially to revise the good faith negotiating rules where it seeks comment on ways to enhance such notice and not permit "hiding the ball" as Shentel proposes. *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No.10-71, FCC 11-31, (rel. March 3, 2011) at ¶¶ 34-37.



# EXHIBIT

1

**From:** Randy Smith [mailto:smith@wset.com]  
**Sent:** Wednesday, December 14, 2011 9:59 AM  
**To:** 'Chris Kyle'  
**Subject:** RE: Shentel Viewing

Chris,

Thanks for the update on your progress. I would certainly hope that you are not paying anything close to our proposed rates for any other station or else we would both be failing miserably our jobs. If you had another station that came close to WSET's dominance, then that would be another situation. There is no station in this area that is as important to any cable system as WSET is to Shentel customers. Forget ABC for a moment, WSET's news at 6pm is watched by more Shentel customers than ALL other television stations COMBINED! I would certainly hope that your agreements with other systems would be less than with WSET! Signals should be valued on the customers that they bring to you and on that fair comparison, WSET is worth much, much more to Shentel than anything we have proposed to date.

If you fail to assign a proper value to WSET in your lineup, then it is doubtful that we will find common ground. I do believe, however, that you fully understand the importance of WSET-TV to your customers and because of that, I believe we can find agreeable terms; however, to make this agreement work by the 12/31 deadline, we need to have an agreement in the next couple of days.

I left a voice mail message for you last night and would welcome the opportunity to continue our conversation. Please let me know how you would like to proceed.

1/17/2012

Thanks,

Randy

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**From:** Chris Kyle [mailto:Chris.Kyle@emp.shentel.com]

**Sent:** Tuesday, December 13, 2011 4:44 PM

**To:** Randy Smith

**Subject:** RE: Shentel Viewing

Thanks Randy. We have negotiated 3 ABC deals since you and I last spoke. They are well below your first offer of [REDACTED]. And also below your second offer of [REDACTED]. I appreciate your work on this and I understand your limitations from corporate.

We feel a fair value for your station is [REDACTED]. We will not pay for any out of market DMA subs. Please relay to your corporate team that we are not paying for out of market DMA subs in our other agreements. Based on what we know now, I cannot justify anything close to your first two proposals.

How do you want to proceed?

Thanks,  
Chris

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**From:** Randy Smith [mailto:smith@wset.com]

**Sent:** Tuesday, December 13, 2011 3:54 PM

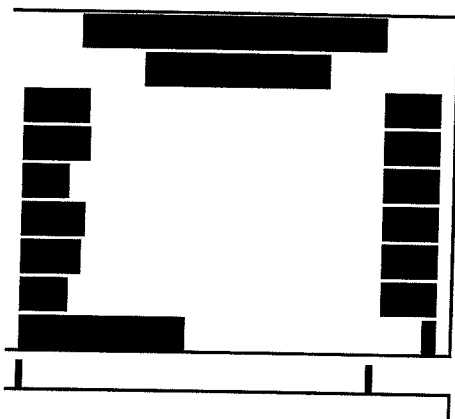
**To:** Chris Kyle

**Subject:** Shentel Viewing

Hi Chris,

Sorry this has taken so long but there were problem inherent with the report I was asking Nielsen to run. I wanted to be able to show you in great detail why WSET is worth more to Shentel than any other signal in the market. The problem that they ran into is actually because of exactly this point. None of the reports, when isolated down to a geography as small as "Shentel Cable Subscribers" could generate a sustainable audience for any cable-only signal that was significant. After attempting several different variations, we finally came up with a report that would show some cable audiences.

That being said, it is still easy to see the point I am making. Here are the overviews: (Shentel Cable Homes Only)



1/17/2012

Case	Age	Sex	Occupation	Onset	Duration	Location	Character	Severity	Frequency	Associated symptoms	Response to treatment	Outcome
1	25	M	Student	1980	10 years	Head	Headache	Severe	1-2 times/week	Nausea, vomiting	Analgesics	Good
2	30	F	Teacher	1985	5 years	Neck	Neck pain	Moderate	3-4 times/week	Stiffness	Physical therapy	Fair
3	35	M	Engineer	1990	8 years	Back	Back pain	Severe	1-2 times/week	Stiffness, numbness	Analgesics, muscle relaxants	Good
4	40	F	Homemaker	1995	3 years	Shoulder	Shoulder pain	Moderate	2-3 times/week	Stiffness	Physical therapy	Fair
5	45	M	Manager	2000	6 years	Wrist	Wrist pain	Severe	1-2 times/week	Stiffness, numbness	Analgesics, splinting	Good
6	50	F	Retired	2005	4 years	Hand	Hand pain	Moderate	2-3 times/week	Stiffness	Physical therapy	Fair
7	55	M	Farmer	2010	2 years	Elbow	Elbow pain	Severe	1-2 times/week	Stiffness	Analgesics	Good
8	60	F	Teacher	2015	1 year	Neck	Neck pain	Moderate	3-4 times/week	Stiffness	Physical therapy	Fair
9	65	M	Engineer	2020	6 months	Back	Back pain	Severe	1-2 times/week	Stiffness, numbness	Analgesics, muscle relaxants	Good
10	70	F	Homemaker	2025	3 months	Shoulder	Shoulder pain	Moderate	2-3 times/week	Stiffness	Physical therapy	Fair

Age Group	Percentage
18-24	35%
25-34	25%
35-44	20%
45-54	15%
55-64	10%
65+	5%

**Randy**

1/17/2012

*Randy Smith*

President

WSET, Incorporated

2320 Langhorne Road

Lynchburg, VA 24501

434-528-1313

434-455-5199 (fax)

[rsmith@wset.com](mailto:rsmith@wset.com)

# EXHIBIT

2

**From:** Chris Kyle [mailto:Chris.Kyle@emp.shentel.com]  
**Sent:** Wednesday, December 07, 2011 4:54 PM  
**To:** Randy Smith  
**Subject:** RE: Idea

I don't know; I need to find David Ferguson here to confirm the station. He received the email. If it was WJLA, I understand the cross ownership. I assumed the station was not WJLA but will confirm.

I'll call you in a couple of minutes.

Chris

---

**From:** Randy Smith [mailto:smith@wset.com]  
**Sent:** Wednesday, December 07, 2011 4:46 PM  
**To:** Chris Kyle  
**Subject:** FW: Idea

I am assuming that you are referring to WJLA, correct? If it is any other station, then yes, I will be upset too.

---

**From:** Randy Smith [mailto:smith@wset.com]  
**Sent:** Wednesday, December 07, 2011 4:02 PM  
**To:** 'Chris Kyle'  
**Subject:** RE: Idea

1/16/2012

Chris,

WSET and WJLA are co-owned. To suggest that we are non-affiliated would be an unimaginable stretch of the imagination, especially since we are both reporting to the same person on these negotiations.

The offer that I made yesterday was less expensive to Shentel than the offer that you refer to as the one that was acceptable to Shentel, so I'm at a loss as to why the change. If you are prepared to proceed with that, so am I, but the offer below is not acceptable.

Regards,

Randy

**From:** Chris Kyle [mailto:Chris.Kyle@emp.shentel.com]

**Sent:** Wednesday, December 07, 2011 3:46 PM

**To:** Randy Smith

**Subject:** RE: Idea

Randy,

Thanks for your response. The last few days have been difficult/confusing after we thought we had negotiated an agreement last week. Today, we were notified in an email that your company shared the rates we are negotiating with WSET with a non-affiliated ABC station that we are also negotiating with. We are extremely upset by this and believe this action does not represent "good faith" or fair negotiations. I don't know who at your company shared the rates but I am not insinuating that it was you.

We propose the following rates and I have already received approval for these rates:

1. In DMA [REDACTED]
2. Out of DMA and significantly viewed [REDACTED]

Let me know how you would like to proceed. We would like to finalize this quickly and sign the contract redline that we sent you last week.

Thanks,  
Chris

---

**From:** Randy Smith [mailto:smith@wset.com]

**Sent:** Tuesday, December 06, 2011 5:01 PM

**To:** Chris Kyle

**Subject:** Idea

Chris,

I've spent a lot of time looking this over and I think I can make this work for both of us. I don't have the final go ahead on this, so don't hold me to it, but If you say OK, I will seek approval. I've attached a spreadsheet that shows the math.

All DMA systems:  
[REDACTED]

Out of DMA systems:  
Significantly viewed counties

1/16/2012



[REDACTED]  
Not significantly viewed counties:  
[REDACTED]

The only out-of-DMA system in a significantly viewed county is Farmville. All of the other out-of-DMA systems are in counties that are NOT significantly viewed.

If you can make this work, I believe I can probably get you this same deal for WJLA in Washington, our co-owned station there, but it does not have to be connected if that muddies the water for you. I checked and it appears that their out-of-DMA subs are also in counties that are not significantly viewed.

Let me know what you think.

Thanks,

Randy

*Randy Smith*

President  
WSET, Incorporated  
2320 Langhorne Road  
Lynchburg, VA 24501  
434-528-1313  
434-455-5199 (fax)  
rsmith@wset.com

1/16/2012

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

\_\_\_\_\_  
In the Matter of )  
 )  
 )

Shentel Telecommunications Company )  
 )  
 )

Emergency Petition for Finding of Bad )  
Faith Retransmission Consent )  
Negotiations and Enforcement of )  
Customer Notice Rules )  
 )

File No. CSR-\_\_\_\_\_

ACC Licensee, Inc.  
WJLA-TV, Washington, D.C.  
\_\_\_\_\_

To: The Secretary's Office  
Attn: The Media Bureau

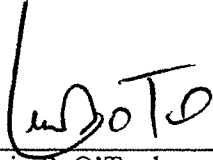
**DECLARATION OF KEVIN P. O'TOOL**

1. My name is Kevin P. O'Tool, and I am the Vice President of Finance for Allbritton Communications Company ("Allbritton"). As part of my duties, I represent Allbritton in retransmission consent negotiations for television station WJLA-TV, Washington, D.C., with multichannel video programming distributors, including cable operators, that provide service to the Washington, D.C. Designated Market Area. I have been participating in retransmission consent negotiations for 10 years.

2. In the performance of my duties, I represented Allbritton in its retransmission consent negotiations with Shentel Telecommunications Company ("Shentel") between September and December of 2011. I have first hand knowledge of all the correspondence and telephone communications that comprised the parties' negotiations. I have reviewed the foregoing Reply to Opposition and declare that the facts contained therein regarding the negotiations between Allbritton and Shentel are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 17, 2012

  
\_\_\_\_\_  
Kevin P. O'Tool  
Vice President, Finance  
Allbritton Communications Company

## CERTIFICATE OF SERVICE

I certify that on this 17th day of January, 2012, I caused the foregoing Reply to Opposition to be served by email, except where First Class mail delivery is indicated, on the following:

William T. Lake  
Chief, Media Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Suzanne M. Tetreault  
Acting Chief, Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Michelle Carey  
Deputy Chief, Media Bureau  
Federal Communications Commission  
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Nancy Murphy  
Associate Chief, Media Bureau  
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Mary Beth Murphy  
Chief, Policy Division, Media Bureau  
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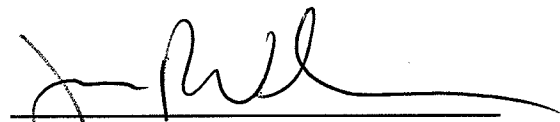
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Washington, DC 20006

\* via First Class Mail

  
Jason E. Rademacher